

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-1585

B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

NORMAN E. WHITNEY

Plaintiff-Appellant

vs.

HERBERT WEEKS, ET AL

Defendants-Appellees

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:

:

:

CIVIL APPEAL

SCHEDULING ORDER #1

Docket No. 76-7585

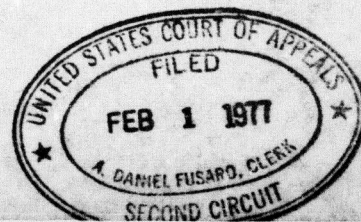
T-6744

PLAINTIFF-APPELLANT'S

BRIEF & APPENDIX

January 31, 1977

Norman E. Whitney, Pro Se
Gilead Rd.
Andover, Conn.
06232



PAGINATION AS IN ORIGINAL COPY

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STATUTES

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STATEMENT OF ISSUE FOR REVIEW

Does the cloak of protection to prosecutors from civil tort liability under the theory espoused in Imbler vs. Pachtman appertain in the case at bar where the case was not being "initiated" nor being "presented" when the alleged criminal and civil rights-denying acts were being committed by the defendant prosecutors?

STATEMENT OF THE FACTS

Plaintiff-Appellant is an attorney who was waiting outside for his client to go into her house and obtain some of her belongings as was agreed by him and her ex-husband's attorney. While his client was in the house, police were summoned to it and arrived while he was standing in the road next to his car. Policeman, defendant Weeks ordered the appellant between him and policeman, defendant Sutton, and the two forced him to enter the building against his will for no apparent nor stated reason.

Once inside, defendant Weeks, appellant, appellant's client and client's ex-husband all agreed that the client, Mrs. Riley, was rightfully in the house and all seemed resolved. Then the ex-husband telephoned his attorney, defendant Weeks talked on the telephone; and subsequently appellant's client was questioned by police and even warned to leave her home. Appellant attempted to protect his client by discussion, and defendant Weeks threw him across the kitchen, pounded his back, reopened a sutured finger wound, dragged him across the lawn and falsely arrested him.

Appellant was taken to the police station, booked, fingerprinted, photographed and presented for plea all within the next few hours. He was charged with the crime of interfering with a police officer and released on his own recognizance. The case against him had been initiated.

A day or two later, the appellant went to the office of defendant-appellant John Lombardo to ask that the foregoing outrage be rectified. Lombardo committed the flagrant criminal acts of Coercion, C.G.S. 53 a-192, and of Bribery, C.G.S. 53a-148; He offered the appellant a dismissal of the charge of Interfering with an Officer in return for plaintiff's execution of two releases flowing to the Town of East Hartford and the defendant policemen herein. Otherwise, he would prosecute the case, the appellant was told. Appellant refused to become a criminal and did not accede

to appellee's demand. He elected to stand trial instead but the matter was nolle because the state had no case and Lombardo knew the appellant would bring up the foregoing facts at trial.

Further facts would show that both appellees Lombardo and Kelly spent the next several months avoiding the Connecticut Practice Book Rules in pleading the criminal matter, but since this could be considered during the "presentment" of a case, the appellant will only allude briefly to their unconscionable conduct by incorporating his Statement of the Case in his Brief in Opposition to Defendant Lombardo and Kelly's Motion to Dismiss and For Summary Judgment dated March 15, 1976, which is hereby made part of this brief. It will be requested of the District Court Clerk in a Supplemental Record on Appeal.

Appellant then brought a civil action under 42 U.S.C. Sections 1983 and 1988 alleging deprivation by the appellees under color of law of his rights, privileges, and immunities as guaranteed by the First, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States. The District Court held, in granting appellees' Motion to Dismiss the following:

The prosecutors' motion to dismiss must be granted in light of the Supreme Court's recent ruling that prosecutors sued under 42 U.S.C. § 1983 must enjoy 'the same absolute immunity' they had at common law, at least when they are involved 'in initiating a prosecution and in presenting the State's case.' Imbler v. Pachtman, 44 U.S. L.W. 4250 (U.S. Mar. 2, 1976). The prosecutors' actions in this case--deciding whether to press or to nolle prosequi the charges against the plaintiff--clearly fall within the area of immunity carved out in Imbler.

Clearly the lower court simply ignored the most serious allegations of appellant's complaint, - that of crimes perpetrated by appellees which do not enjoy "Imbler" protection which also clearly infringed on appellant's rights.

ARGUMENT

The acts of defendant prosecutors were not performed either in the "initiation" of a prosecution or the "presentment" of a prosecution. While there are a multitude of cases some holding for prosecutorial immunity and others not, this appellant will rely only upon Imbler v. Pachtman ...U.S.....(March 1976), No. 74-5435; Criminal Law Reporter 3/3/76 Vol. 18 No. 22. The court held,

"We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of administrative or investigative officer rather than that of advocate. We hold only (emphasis added) that in initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under § 1983."

The above case is probably the strongest support for prosecutorial immunity and a fair reading of it would both frighten and enrage any decent person over the treatment handed the plaintiff therein because the defendant prosecutor during trial kept exculpatory evidence from plaintiff, then defendant, and committed six other acts which were unfairly detrimental to him. Yet even though that plaintiff was sentenced to death he was denied his remedy at civil law.

The court was extremely careful to leave a strong exception, however, and that is that immunity obtains only 1) where a prosecution is "initiated" or 2) where a prosecution is "presented". The reasoning of the supreme court was that prosecutors would be unfairly hampered from vigorously pursuing their duties if the threat of civil suit hung over them at every step and decision of a prosecution. Here, however, this was not the impediment which made appellees act as they did. They merely tried to criminally protect the coffers of their town and concomitantly deny appellant his civil rights guaranteed under the laws of the United States. Clearly, the defendant prosecutors herein are not cloaked by either aegis above enumerated. They simply broke the criminal law themselves while enjoying an excursion far afield from their duties.

CONCLUSION

Because the special protection afforded prosecutors under Imbler does not here appertain, the appellees' Motion to Dismiss should be denied.

PLAINTIFF

By:

Norman E. Whitney
Norman E. Whitney
Pro Se
Gilead Road

Andover, Connecticut 06232

APPENDIX

Docket Entries:

Brief in Support of Defendant's (John Lombardo and Eugene Kelly) Motion to Dismiss and for Summary Judgment and Opposition Briefs.

Ruling on Motion to Dismiss, Blumenfeld, J. m 8-16-76
(dismissed against Jacobs, Kelly, and Lombardo)

Partial Judgment entered, Markowski, C. m 10-18-76,
Copies to Counsel

Relevant Portion of Opinion:

"The prosecutors' motion to dismiss must be granted in light of the Supreme court's recent ruling that prosecutors sued under 42 U.S.C. 1983 must enjoy 'the same absolute immunity' they had at common law, at least when they are involved 'in initiating a prosecution and in presenting the State's case.'"

The Judgment:

".....It is accordingly ORDERED and ADJUDGED that the Plaintiff's Complaint be and hereby is dismissed as to the Defendant's Jacobs, Kelly and Lombardo."

Other Part of Record for Direct Attention of the Court:

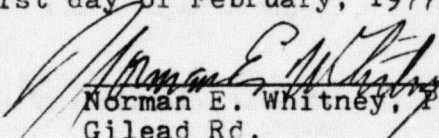
".....A defendant in a criminal prosecution does not have a constitutional right not to be asked to sign a release form (laying to one side the efficacy of such a waiver) in return for a dismissal of charges, especially where the facts show that the charge was dropped without any further request that a release be signed. No facts have been alleged to show that defendant Lombardo in any way abused his prosecutorial discretion."

Brief in support of Defendants'
(Lombardo and Kelly) Motion to Dismiss and for Summary Judgment.

CERTIFICATION

This is to certify that a copy of the within and foregoing Appeal has been mailed to Jon S. Berk and Edward J. Foley, 39 Lafayette Street, Hartford, Connecticut, 06106; Glen E. Coe and John F. Mulcahy, Jr., Drawer H, Amity Station, New Haven, Connecticut 06525; and Barney M. Lapp, 30 Trinity Street, Hartford, Connecticut 06101 this 1st day of February, 1977.

Dated at Andover, Connecticut this 1st day of February, 1977.


Norman E. Whitney, Pro Se
Gilead Rd.
Andover, Conn. 06232

OFFICE	DOCKET		FILING DATE			J	N/S	O	R	R 23	S	DEMAND 200, OTHER	JUDGE NUMBER	JURY DLM.	DOCKET	
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10/22/76 placed on PLAINTIFFS
jury trial list

& JOSEPH ZILBERMAN, DEFENDANTS

WHITNEY, Norman E.

WEEKS, Herbert and Ronald Sutton,
members of the East Hartford Police
Dept. who are sued in their individual
and official capacities, ~~Atty/John~~
~~Lombardo~~/retired Assistant Prosecutor
for the then Circuit Court 12, East
Hartford and his immediate supervisor
~~Atty/John/John/John~~ Prosecutor of the
same Court who are both sued individu-
& in their official capacities and
~~Atty/John/John/John~~ Chief Judge of
the then Circuit Court

8/16/76 dismissed against Jacobs, Kelly &
Lombardo

CAUSE

42 USC §1981 & 1983 ; alleges false imprisonment , false arrest, assault, battery
and interference with advantageous business relationships. Seeks damages

ag

ATTORNEYS

Norman E. Whitney, Pro Se
Gilead Rd
Andover, Conn. 06232
tel. 742-8497

Jon S. Berk &
Edward J. Foley (Weeks and Sutton)
39 Lafayette St
Hartford, Ct. 06106

Glenn E. Coe. (Lombardo & Kelly)
Asst. Prosecuting Attorney
Drawer H, Amity Station
New Haven, CT.-----

John F. Mulcahy, Jr. (Lombardo
Deputy Chief State's and Kelly)
Attorney
Drawer H, Amity Station
New Haven, CT.

Barry Lapp (Hon. David Jacobs)
Asst. Atty General
30 Trinity St.
Hartford, Conn. 06115
tel. 566-2203

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DATE	RECEIPT NUMBER	C.D. NUMBER

STATISTICAL CARDS

CARD	DATE MAILED
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JS-6	

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CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

NORMAN E. WHITNEY

:

v.

:

CIVIL NO. H-76-51

HERBERT WEEKS, ET AL.

:

RULING ON MOTIONS TO DISMISS

Plaintiff, an attorney, has brought this civil rights complaint against two East Hartford policemen, two state prosecuting attorneys, and a state judge. The prosecutors and judge have moved for dismissal as to them, and their motions are granted.

This case is based on an altercation which occurred while plaintiff was representing one of his clients in a divorce action. On January 31, 1974, he accompanied his client to her home, owned in joint tenancy with her husband, so that her interests could be protected while she gathered some belongings. After she had entered the house two policemen, defendants in this action, arrived. Soon a dispute arose concerning the right of the plaintiff and his client to be on the premises. The plaintiff was eventually arrested by officer Herbert Weeks, allegedly after Weeks assaulted him.

Following his arrest, plaintiff attempted to handle his own criminal defense. However, he allegedly encountered delays at the hands of the circuit court clerk's office, and

with correction
date 8/16/76

evasion or misconduct at the hands of the prosecutor's office. The plaintiff finally sought an investigation of these events from Judge David Jacobs, also a defendant in this case. At that time Judge Jacobs was Chief Judge of the 12th Circuit Court, the court in which the charges against plaintiff were pending.^{2/} Judge Jacobs responded to plaintiff by letter, informing him that the state police had conducted an investigation of the incident and had concluded that his charges were without merit. Judge Jacobs refused plaintiff's request for access to the report. This suit followed.

The prosecutors' motion to dismiss must be granted in light of the Supreme Court's recent ruling that prosecutors sued under 42 U.S.C. § 1983 must enjoy "the same absolute immunity" they had at common law, at least when they are involved "in initiating a prosecution and in presenting the State's case." Imbler v. Pachtman, 44 U.S.L.W. 4250 (U.S. Mar. 2, 1976). The prosecutors' actions in this case--deciding whether to press or to nolle prosequi the charges against the plaintiff--clearly fall within the area of

1/

The plaintiff charges that the prosecutors improperly nolled the charges against him, in an effort to prevent the truth from coming out at argument of his motion to dismiss. He also charges that they improperly attempted to use the criminal charges brought against him as a bargaining chip for obtaining releases of civil liability for the arresting officers. But cf. Boyd v. Adams, 513 F.2d 83, 86 (7th Cir. 1975).

2/

The circuit courts were merged into the courts of common pleas as of December 31, 1974. Public Act 74-183 (1974).

immunity carved out in Imbler.^{3/} The complaint is dismissed as to defendants Kelly and Lombardo.

Judge Jacobs has also moved to dismiss on immunity grounds. The claim against Judge Jacobs is based on plaintiff's request that the judge initiate an investigation into the actions of the clerk's office personnel and of the prosecuting attorneys. Whether the judge is protected from a damage suit for these actions depends upon whether these actions were taken in the performance of his judicial function.^{4/} The characterization of the actions, however, depends upon state law. Roudebush v. Hartke, 405 U.S. 15, 20-21 (1972).

As Chief Judge of the 12th Circuit Court, Judge Jacobs had overall responsibility for the "efficient operation of the court." Conn. Gen. Stat. Ann. § 51-5. Furthermore, the judges of the Superior Court are responsible for the appointment and removal of the clerical personnel of the courts. Conn. Gen. Stat. Ann. § 51-168. Thus, an inquiry into the allegedly negligent acts of the clerk's office fell within his judicial function. Similarly, in Connecticut, the prosecutorial function is handled by the State's attorneys,

^{3/}

As Mr. Justice Powell noted in Imbler, both the federal and state sovereigns may provide for criminal punishment of a prosecutor who acted improperly.

^{4/}

Schwartz v. Weinstein, 459 F.2d 882, 883 (8th Cir. 1972). Cf. Spires v. Bottorff, 317 F.2d 273 (7th Cir. 1963).

who are appointed by, and subject to removal by, the judges of the Superior Court. Conn. Gen. Stat. Ann. § 51-278. A similar arrangement was in effect for the circuit court at the time of the events underlying this complaint.^{5/} Thus, Judge Jacobs acted "within [his] judicial role" in responding to plaintiff's inquiries, and he is immune from suit in this action for damages.^{6/} Pierson v. Ray, 386 U.S. 547, 554 (1967).

The motions to dismiss on behalf of defendants Jacobs, Kelly and Lombardo are granted.^{7/}

SO ORDERED.

Dated at Hartford, Connecticut, this 16th day of August, 1976.

M. Joseph Blumenfeld
M. Joseph Blumenfeld
United States District Judge

^{5/}
1959 Public Act 28, §§ 7-10; Conn. Gen. Stat. Ann. § 51-251 et seq.

^{6/}
Cf. Doe v. County of Lake, Indiana, 399 F. Supp. 553 (N.D. Ind. 1975), drawing the distinction between damages and equitable relief, and between judicial and administrative or ministerial actions.

^{7/}
Plaintiff has also brought suit for redress of the common law torts of assault, battery, false arrest, false imprisonment, and interference with an advantageous business relationship. In view of all three defendants' immunity under federal law, I decline to exercise pendent jurisdiction as to these claims, whatever their validity.